Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL SUIT NO W–02–383 OF 1996

GOPAL SRI RAM, MOKHTAR SIDIN AND HAIDAR JJCA

28 FEBRUARY 2000

Civil Procedure *— Summary judgment — Action to recover moneys loaned — Whether reasonable cause of action — Conflict of material affidavit evidence — Bulky pleadings — Whether court to exercise its summary powers — Rules of the High Court 1980 O 18 r 19*

Perdana Merchant Bankers Bhd ('Perdana') and five other financial institutions ('the lenders') granted a syndicated term loan of RM20m to Carah Enterprise Sdn Bhd ('Carah') under a facility agreement. Carah was the plaintiff in a civil action filed in Johor Bharu ('the JB action') where the defendant was Perdana, which was sued in its capacity as principal and trustee, the manager and agent for the said five financial institutions. Another civil suit was filed in Kuala Lumpur ('the KL action') whereby the plaintiffs were the lenders and the four defendants were the guarantors of the term loan. In the JB action, the lenders through Perdana applied to strike out Carah's writ of summons and statement of claim under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('the RHC') and at the same time applied for summary judgment under O 14 of the RHC on their counterclaim against Carah. In the KL action, the lenders applied for summary judgment under O 14 on their claim against the four defendants. The actions were subsequently consolidated and heard as one. The trial judge held that there were no triable issues in those two actions and the writ of summons and statement of claim by Carah were struck off under O 18 and the lenders' application for summary judgment on the counterclaim was allowed. The judge also allowed the lenders application for summary judgment in their claim against the four defendants in the KL action. Against that decision, the appellants (the four defendants in the KL action and Carah in the JB action) appealed.

Held, allowing the appeal:

(1) At this stage of the proceedings, on an application under O 18 r 19(1) of the RHC, the court was not concerned with the prospect of success or failure of Carah's claim. This is a matter for the trial judge to decide on the evidence adduced before him. The court was only concerned whether there was a reasonable cause of action raised by the appellants. The court found that the allegations in Carah's statement of claim, on the assumption that they were true or proven, and without looking at the affidavit

evidence, clearly disclosed a reasonable cause of action. Accordingly, the lenders' application to strike out Carah's statement of claim under O 18 r 19(1)(a) of the RHC could not succeed (see p 426A–C). A

(2) In considering whether Carah's statement of claim was scandalous, frivolous or vexatious under O 18 r 19(1)(b), or was an abuse of the process of the court under O 18 r 19(1)(c), the court is entitled to look at the affidavit evidence and the exhibits. Looking at the pleadings and the affidavit and the various exhibits filed by Carah and the lenders, there was a serious conflict of material affidavit evidence which could only be resolved by subjecting the deponents to cross-examinations and/or calling other witnesses whose evidence could only be evaluated by the court after seeing and hearing them (see p 426G–H). B C

(3) The court should not examine the evidence in such a way as to amount to conduct a trial on the conflicting material affidavit evidence. In the present appeal, the pleadings run to dozens of pages, the opposing affidavits and the exhibits for both sides run to hundred of pages. In the circumstances of this case, the court did not consider that this was a proper case to embark on a minute and protracted examination of the entire evidence in the appeal record which is already bulky (see p 427E–F). D E

(4) As the court had already found that Carah's statement of claim did disclose a reasonable cause of action and that there was a triable issue, the inevitable conclusion would be that Carah's statement of claim in all the circumstances of the case could not be said to be scandalous, frivolous or vexatious or an abuse of the process of the court. The court was unable to say that the claim was not bona fide or that the claim was bound to fail from the beginning. This was therefore not a proper case for the court to exercise its summary power under O 18 r 19 of the RHC (see p 428B–C). F

(5) In the JB action, the lenders' application for summary judgment on their counterclaim was made under O 14 r 5. It was clear that the counterclaim was directly related to the same subject matter where the court had held that Carah's claim was not scandalous, frivolous or vexatious and it did raise a reasonable cause of action. As the court had held that there was a triable issue in Carah's claim, there was no ground to grant summary judgment against Carah in the counterclaim (see p 429C–D). G H

(6) For the lenders to succeed summarily without any trial of the two consolidated actions, the lenders must in the very first place succeed in striking out Carah's statement of claim in the JB action and in obtaining summary judgment in their counterclaim against Carah. However, as the court had ruled against the lenders in their application in the JB action, their application for summary I

judgment in the KL action must also fail, as the outcome in the JB action will have a direct bearing on the KL action (see p 429E–F).

[Bahasa Malaysia summary

Perdana Merchant Bankers Bhd ('Perdana') dan lima institusi kewangan yang lain ('peminjam-peminjam tersebut') telah memberikan suatu pinjaman tempoh sebanyak RM20j kepada Carah Enterprise Sdn Bhd ('Carah') di bawah suatu perjanjian kemudahan. Carah adalah plaintif di dalam tindakan sivil yang difailkan di Johor Bahru ('tindakan JB') di mana defendan adalah Perdana, yang disaman di dalam kapisiti sebagai prinsipal dan pemegang amanah, pengurus dan ejen untuk lima institusi kewangan tersebut. Suatu lagi tindakan sivil telah difailkan di Kuala Lumpur ('tindakan KL') di mana plaintif-plaintif adalah peminjam-peminjam dan keempat-empat defendan adalah penjamin untuk perjanjian tempoh tersebut. Di dalam tindakan JB, peminjam-peminjam melalui Perdana telah memohon untuk membatalkan writ saman dan pernyataan tuntutan Carah di bawah A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan pada masa yang sama memohon penghakiman terus di bawah A 14 KMT di atas tuntutan balas terhadap Carah. Di dalam tindakan KL, peminjam-peminjam telah memohon penghakiman terus di bawah A 14 di atas tuntutannya terhadap keempat-empat defendan. Kemudian tindakan-tindakan tersebut disatukan dan didengar sekali. Hakim perbicaraan memutuskan bahawa tidak terdapat isu yang boleh dibicarakan di dalam dua tindakan tersebut dan writ saman dan pernyataan tuntutan oleh Carah diketepikan di bawah A 18 dan permohonan peminjam untuk penghakiman terus di atas tuntutan balas dibenarkan. Hakim juga membenarkan permohonan peminjam-peminjam untuk penghakiman terus di atas tuntutan mereka terhadap keempat-empat defendan di dalam tindakan di KL. Terhadap keputusan tersebut perayu-perayu (keempat-empat defendan di dalam tindakan KL dan Carah di dalam tindakan JB) telah merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Di peringkat prosiding-prosiding ini di atas suatu permohonan di bawah A 18 k 19(1) KMT, mahkamah tidak mementingkan prospek kejayaan atau kegagalan tuntutan Carah. Ini adalah perkara bagi hakim membicara untuk memutuskan berdasarkan keterangan yang dikemukakan di hadapannya. Mahkamah hanya mementingkan sama ada terdapat kausa tindakan yang munasabah yang dibangkitkan oleh perayu-perayu. Mahkamah mendapati bahawa pengataan-pengataan Carah di dalam penyataan tuntutan, di atas andaian bahawa mereka adalah benar atau terbukti, dan tanpa melihat keterangan afidavit, dengan jelas

menunjukkan suatu kausa tindakan yang munasabah. Oleh itu, permohonan peminjam untuk mengetepikan pernyataan tuntutan Carah di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi tidak boleh berjaya (lihat ms 426A–C). A

(2) Di dalam mempertimbangkan sama ada pernyataan tuntutan Carah adalah mengaibkan, remeh atau menyusahkan di bawah A 18 k 19(1)(b), atau penyalahgunaan proses mahkamah di bawah A 18 k 19(1)(c), mahkamah berhak untuk melihat keterangan afidavit dan ekshibit-ekshibit. Melihat pliding-pliding dan afidavit tersebut dan juga afidavit yang pelbagai difailkan oleh Carah dan juga peminjam-peminjam, terdapat konflik yang serius berkenaan dengan keterangan afidavit yang penting yang boleh diselesaikan dengan memaksa defendan disoal balas dan/atau memanggil saksi-saksi yang lain di mana keterangan hanya boleh dinilaikan oleh mahkamah selepas melihat dan mendengar mereka (lihat ms 426G–H). B C

(3) Mahkamah tidak patut memeriksa keterangan dengan cara di mana akan terjumlah kepada mengadakan perbicaraan dengan keterangan afidavit material yang bertentangan. Di dalam rayuan ini, pliding-pliding tersebut adalah tebal. Di dalam keadaan-keadaan kes, mahkamah tidak mempertimbangkan bahawa ini adalah kes yang wajar untuk memulakan pemeriksaan teliti dan berpanjangan ke atas semua keterangan di dalam rekod rayuan yang dengan sendiri adalah tebal (lihat ms 427E–F). D E

(4) Oleh kerana mahkamah telah mendapati bahawa pernyataan tuntutan Carah telah mendedahkan suatu kausa tindakan yang munasabah dan bahawa terdapat isu yang boleh dibicarakan, kesimpulan yang tidak boleh dielakkan adalah bahawa pernyataan tuntutan Carah di dalam keadaan-keadaan kes tidak boleh dikatakan sebagai mengaibkan, remeh atau menyusahkan atau suatu penyalahgunaan proses mahkamah. Mahkamah tidak boleh mengatakan bahawa tuntutan tersebut tidak bona fide atau tuntutan tersebut akan pasti gagal dari mula lagi. Ini bukanlah suatu kes yang wajar bagi mahkamah untuk menjalankan kuasa terusnya di bawah A 18 k 19 KMT (lihat ms 428B–C). F G

(5) Di dalam tindakan JB, permohonan peminjam-peminjam untuk penghakiman terus di atas tuntutan balas dibuat di bawah A 14 k 5. Adalah jelas bahawa tuntutan balas adalah secara terus berkaitan dengan subjek perkara yang sama di mana mahkamah memutuskan bahawa tuntutan Carah adalah mengaibkan, remeh dan menyusahkan dan ia tidak membangkitkan suatu kausa tindakan yang munasabah. Oleh kerana mahkamah telah memutuskan bahawa terdapat isu yang boleh dibicarakan di dalam tuntutan Carah, tiada alasan untuk membenarkan penghakiman terus terhadap Carah di dalam tuntutan balas (lihat ms 429C–D). H I

(6) Bagi peminjam-peminjam untuk berjaya secara terus tanpa sebarang perbicaraan di dalam dua tindakan yang disatukan, peminjam-peminjam mestilah pada mulanya berjaya mengetepikan pernyataan tuntutan Carah di dalam tindakan JB dan memperolehi penghakiman terus di dalam tuntutan terhadap Carah. Namun, oleh kerana mahkamah telah memberikan keputusan menentang peminjam-peminjam di dalam permohonan mereka di dalam tindakan JB, permohonan mereka untuk penghakiman terus di dalam tindakan KL mestilah juga gagal, kerana keputusan di dalam tindakan JB mempunyai kesan terus di dalam tindakan KL (lihat ms 429E–F).]

Notes

For cases on summary judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4372–4778.

Cases referred to

American Cyanamid v Ethicon Ltd [1975] AC 396 (refd)

Attorney-General of the Duchy of Lancaster v London and North Western Railway Co [1892] 3 Ch 274 (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (refd)

Drummond-Jackson v British Medical Association & Ors [1970] 1 All ER 1094 (refd)

Eng Mee Yong v Letchumanan [1979] 2 MLJ 212 (refd)

Honan Plantations Sdn Bhd v Kerajaan Negeri Johor [1998] 2 MLJ 498 (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)

New Straits Times (M) Sdn Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226 (refd)

Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113 (refd)

Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (refd)

Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)

Legislation referred to

Rules of the High Court 1980 O 14 r (1), (5), O 18 r 19(1) (a), (b), (d), (2)

Appeal from: High Court Suit No D1–22–501–of 1994 (High Court, Kuala Lumpur) consolidated with High Court Civil Suit No 22–98–94 (High Court, Johor Bahru)

Wong Kim Fatt (*Gan Huey Piin* with him) (*Gulam & Wong*) for the appellants.

Wong Chee Lin (*Skrine & Co*) for the respondents.

Mokhtar Sidin JCA (delivering judgment of the court): The background of this appeal may be stated briefly as follows. There are two civil actions involved. One of them is Johor Bahru Civil Suit No 22–98–1994. It was filed in the High Court at Johor Bahru ('the JB action'). The other is Kuala Lumpur High Court Civil Suit No D1-22-501-1994 (hereinafter referred to as 'the KL action'). These two civil actions arose from a syndicated term loan of RM20m granted under a facility agreement dated 30 June 1992 by Perdana Merchant Bankers Bhd (formerly known as Intradagang Merchant Bankers (M) Berhad) and five other financial institutions which were the six lenders (hereinafter collectively referred to as 'the lenders') to a company called Carah Enterprise Sdn Bhd (hereinafter referred to as 'Carah'). Carah (the fifth appellant in this appeal) is the plaintiff in the JB action where the defendant is Perdana Merchant Bankers Bhd (hereinafter referred to as 'Perdana') which was sued in its capacity as principal and trustee, the manager and agent for the aforesaid five financial institutions.

In the KL action, the plaintiffs are the lenders and the four defendants (the first to fourth appellants) are the guarantors of the term loan under the said facility agreement. In the JB action the lenders through Perdana by their summons in chambers dated 8 June 1994 applied to strike out Carah's writ of summons and statement of claim, under O 18 r 19(a), (b) and (d) of the Rules of the High Court 1980 and at the same time applied for summary judgment under O 14 of the Rules of the High Court on their counterclaim against Carah. In the KL action, the lenders by summons in chambers dated 8 July 1994 applied for summary judgment under O 14 on their claim against the first to fourth appellants.

On 22 September 1994, on the application of the lenders, Mohd Ghazali JC (as he then was) made a consent order to transfer the JB action to Kuala Lumpur High Court and thereby be consolidated with the KL action. Apparently, the parties agreed that the two consolidated actions be heard as one.

On 19 May 1995, the lenders' two summonses in chambers aforesaid were heard by the senior assistant registrar and on 26 June 1995 the senior assistant registrar dismissed the lenders' applications in the two summonses in chambers, that is to strike out Carah's writ of summons and statement of claim under O 18 and she dismissed the application for summary judgment under O 14 by the lenders in the counterclaim in the JB action and the claim in the KL action.

Being dissatisfied with that decision, the lenders appealed to the judge in chambers. The learned judge who heard the appeal invited counsel representing both parties to prepare and submit their written submissions. He, however, did not hear oral arguments. In his decision on 21 June 1996 the learned judge held that there are no triable issues in those two actions and allowed the appeal by the lenders with costs and set aside the order

made by the senior assistant registrar. Accordingly, the writ of summons and statement of claim by Carah in the JB action were struck off under O 18 and the lenders' application for summary judgment on the counterclaim was allowed. The learned judge also allowed the lenders' application for summary judgment in their claim against the first to fourth appellants in the KL action. Against that decision the appellants (the four defendants in the KL action and Carah in the JB action) appealed to this court.

After hearing the submissions of counsel for both sides we unanimously allowed the appeal and set aside the order of the learned judge with costs here and below.

Let us deal first with the lenders' application under O 18 r 19(1)(a), that is, to strike out Carah's statement of claim on the ground that it discloses no reasonable cause of action. Order 18 r 19(2) of the Rules of the High Court 1980 provides that no evidence shall be admissible for an application under r 19(1)(a). Order 18 r 19 provides:

> 19 Striking out pleadings and indorsements
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).
>
> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

In this appeal, we have gone through the record and it is clear to us that the appellants in response to the lenders' application had filed two lengthy affidavits with some 11 exhibits and the lenders had filed four lengthy affidavits with not less than 20 exhibits. In considering an application under O 18 r 19(1)(a), the court has to take into account the statement of claim on the face of it and no consideration whatsoever shall be paid to the evidence in the form of these affidavits. So long as the statement of claim discloses a reasonable cause of action, however weak the claim is, the claim cannot be struck off summarily. At that stage of the proceedings it is not for us or for the learned judge of the High Court to consider the merits of Carah's claim. On an application under O 18 r 19(1)(a) the court has only to consider whether the statement of claim discloses a reasonable cause of action. The well established principle is that the court will not summarily

strike out pleadings, except only in plain and obvious cases where the claim or counterclaim is plainly and obviously not sustainable. In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113, a recent decision of the Federal Court, Gopal Sri Ram JCA at p 136 said:

> The power to summarily strike out a pleading must be sparingly exercised, and in respect of the philosophy that underlies the exercise of that power, we can do no better than to quote from the judgment of Mohamed Dzaiddin SCJ in *Bandar Builder Sdn Bhd v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 at p 44:
>
> > 'This court as well as the court below is not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see *Moore v Lawson* (1915) 31 TLR 418 and *Wenlock v Moloney & Ors* [1965] 1 WLR 1238).'

See also *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor* [1998] 2 MLJ 498 (CA); *New Straits Times (M) Sdn Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 (FC); *Drummond-Jackson v British Medical Association & Ors* [1970] 1 All ER 1094 (CA) and the old English case of *Attorney-General of the Duchy of Lancaster v London and North Western Railway Co* [1892] 3 Ch 274 (CA) When it is shown that there is a reasonable cause, however weak it is, the court should refuse the application.

Counsel for the appellants, Mr Wong Kim Fatt, submitted that the term loan of RM20m should be disbursed to Dresdner Bank in Germany by the lenders in two drawdowns of RM10m each, against each of the two relevant certificates of the project consultants and not in one lump sum of RM20m, as the lenders had done on 21 July 1992. He submitted that when the lenders paid the RM20m, they had acted negligently in breach of their duty of care or in breach of the facility agreement. It was contended by Mr Wong that no certificate of the consultants had been issued when the payments were made. He argued that the lenders had also failed to recall the completion guarantee of RM20m by 21 July 1994 from Dresdner Bank. He referred to para 10 of the statement of claim of Carah on allegations of negligence and breach of the agreement on the part of the lenders and para 13 on the completion guarantee. For the purpose of this appeal we need only to consider paras 10(1) and 10(1)(a) of the statement of claim. These paras read as follows:

> 10 (1) The First Defendant had acted negligently or in breach of its duty of care or in breach of the aforesaid agreements, the Conditions Precedent, and the said unsigned Drawing Notices in the Schedule 4, and the two Drawing Notices signed blank in Schedule 4A, and Schedule 4B of the Facility Agreement subsequent to the signing of

A the Facility Agreement which took place at the signing ceremony on 30 June 1992 before the release of the said loan on 21 July 1992, in that the First Defendant, as evidenced by its letter dated 21 July 1992 addressed to the plaintiff, had remitted in full on 21 July 1992 without the knowledge, consent or authority of the plaintiff, the said loan of RM20 million in one single drawdown by telegraphic transfer
B to the account of the Contractor Rheinhold Mahla AG account No 6–594–803 with Dresdner Bank AG at Mannheim, Germany, when the first defendant knew, or ought to have known, that the conditions precedent stipulated in the Drawing Notices in the Schedule 4, Schedule 4A, and Schedule 4B, of the Facility Agreement had not at all material times been fulfilled, viz:

C (a) The certificate of the Contractor under (d) (i) at p 49 of the Facility Agreement and the certificate of the Project Consultants under (d)(ii) of the unsigned Drawing Notice in the Schedule 4 of the Facility Agreement at p 49 had not been issued by 21 July 1992 when the said loan was released.

D Counsel for the respondents, Ms Wong Chee Lin, argued strenuously that the disbursement of the loan in one single drawdown of RM20m was made pursuant to the terms of the facility agreement and on the written instruction of Carah in Sch 4, and that Carah knew that the loan was to be disbursed to Dresdner Bank in Germany for the account of the contractor in one single drawdown of RM20m on 21 July 1992. The lenders appeared
E to rely heavily on the Sch 4 notice which they contended had been duly completed and signed by Carah. She submitted that the lenders' failure to recall successfully the completion guarantee of RM20m on 21 July 1994 was due to the fault of Carah in starting the foundation works of the factory. She stated before us and in her written submissions that the 'lenders had
F commenced arbitration proceedings against Dresdner Bank in Germany but were unsuccessful in the said proceedings'.

In his reply, counsel for the appellants submitted that Carah had signed three schedules, ie Schedules 4, 4A and 4B, all in blanks, to be used by the lenders for the two drawdowns only when all the terms and conditions had
G been satisfied. He also submitted that Carah was advised by the lenders that the loan could not be disbursed without the approval of Bank Negara Malaysia and that Carah did not know that the lenders had already disbursed the loan of RM20m in one single drawdown on 21 July 1992. This is clear when Perdana, a few days later (on 27 July 1992), drafted and faxed to Carah a specimen letter intended to be sent by Carah under its
H letterhead to Bank Negara applying for Bank Negara's blanket approval for disbursement of the said loan. He argued that the lenders in their statement of defence in the JB action had pleaded in para 37 that the lenders had represented that they would be able to recall the completion guarantee on 21 July 1994. This they failed to do. Paragraph 37 of the lenders' defence
I read as follows:

> In reply to para 13(4) of the Statement of Claim, the first defendant denies that it has no recourse against Dresdner Bank under the Completion

Guarantee. It is, inter alia, the first defendant's contention that the guaranteed sum of RM20 million will become due and payable by Dresdner Bank on the 21 July 1994.

We would like to make it clear that at this stage of the proceedings on an application under O 18 r 19(1) of the Rules of the High Court 1980, we are not concerned with the prospect of success or failure of Carah's claim. This is a matter for the trial judge to decide on the evidence adduced before him. We are only concerned whether there is a reasonable cause of action raised by the appellants. We are of the opinion that the allegations in paras 10(1) and 10(1)(a) of Carah's statement of claim, on the assumption that they are true or proven, and without looking at the affidavit evidence, clearly disclose a reasonable cause of action. Accordingly, we are of the view that the lenders' application to strike out Carah's statement of claim under O 18 r 19(1)(a) of the Rules of the High Court cannot succeed.

The lenders' reply to para 10(1) and 10(l)(a) of Carah's statement of claim (stated above) is found in para 24 and 25 of the lenders' amended defence and counterclaim dated 9 May 1994 which are as follows:

24 Paragraph 10 of the Statement of Claim is denied. The first defendant states that the drawdown of the Facility in one lump sum of RM20 million on 21 July 1992 by telegraphic transfer to the account of R & M with Dresdner Bank was in compliance with the provisions of the Facility Agreement and the Drawing Notice dated 13 July 1992 executed by the plaintiff in the form set out in Schedule 4 to the Facility Agreement and that there is no negligence or any breach of duty as the loan amount was released in accordance with the Facility Agreement dated 30 June 1992 and consistent with the requirements of the Construction Contract between the plaintiff and R & M and the invoice dated 9 March 1992 by R & M.

25 Paragraph 10(1)(a) of the Statement of Claim is denied. The first defendant states that the Certificate of the Project Consultant and R & M were issued to the plaintiff on 1 July 1992 and 9 March 1992 respectively and the said certificates were enclosed with the plaintiff's Drawing Notice dated 13 July 1992.

In considering whether Carah's statement of claim is scandalous, frivolous or vexatious under O 18 r 19(1)(b), or is an abuse of the process of the court under O 18 r 19(1)(d) or under the inherent jurisdiction of the court under O 92 r 4, the court is entitled to look at the affidavit evidence and the exhibits. Looking at the above pleadings, and the lengthy affidavits and the various exhibits filed by Carah and the lenders, there is a serious conflict of material affidavit evidence which can only be resolved by subjecting the deponents to cross-examinations and/or calling other witnesses whose evidence can only be evaluated by the court after seeing and hearing them. The court cannot conduct a trial on the silent cold-printed or typewritten words in the opposing affidavits where there is a serious dispute or conflict on material facts, a finding of which by the trial judge will have a decisive consequence on the case of the parties. We are mindful of what Lord

Diplock said in the House of Lords in *American Cyanamid v Ethicon Ltd* [1975] AC 396 at p 407:

> ... The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

This passage was cited with approval by the Privy Council in the Malaysian case of *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212.

We are also mindful of the decision of the Privy Council in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1, which held that the Court must scrutinize the evidence to decide if the action was bound to fail. The decision in *Tractors Malaysia* was followed by the former Supreme Court in the case of *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36, the former Supreme Court, however, held that the Court should not embark on a minute protracted examination of the evidence. In our opinion, whether the Court should or should not embark on a minute or protracted examination of the evidence in an O 18 r 19 application will depend on the facts of each case. It may be noted that the material facts in *Tractors Malaysia* and *Raja Zainal Abidin* are different from those in the present appeal. The cardinal rule is that the court should not examine the evidence in such a way as to amount to conduct a trial on the conflicting material affidavit evidence. In the present appeal before us, the pleadings run to dozens of pages, the opposing affidavits and the exhibits for both sides run to hundreds of pages. In the circumstances of this case, we do not consider that this is a proper case to embark on a minute and protracted examination of the entire evidence in the appeal record which is already bulky.

We are of the opinion that there is a serious question to be tried in particular as to whether the lenders should release the term loan in one drawdown of RM20m or in two drawdowns of RM10m each against the certificate or certificates of the independent project consultants and whether the lenders had acted negligently or in breach of their duty of exercising reasonable skill and care, or contrary to the terms of the facility agreement. The lenders relied on the Sch 4 drawdown notice which Carah had stated was signed in blank and filled up by the lenders without the consent or knowledge of Carah. From the statement of claim of Carah and the affidavits filed on its behalf, it appears to us that Carah seriously contends that the certificates of the project consultants were not issued when the loan was released on 21 July 1992. However, according to the defence and affidavits filed for the lenders in the JB action, the certificate of the project consultants was issued. To us this is a serious dispute which could not be resolved by conflicting affidavit evidence. In this connection

too, serious question of law pertaining to the role of bankers as constructive trustees, and the duty to exercise reasonable skill and care on their part as financiers of Carah, can only be determined at a proper and full trial of the consolidated actions where the case of the parties will depend upon a finding of facts by the trial judge on the evidence to be adduced. On this issue we are of the view that this is a triable issue for which Carah is entitled to prosecute its claim and defend the counterclaim.

As we are of the opinion that Carah's statement of claim did disclose a reasonable cause of action and that there is a triable issue, the inevitable would be that Carah's claim in all the circumstances of this case cannot be said to be scandalous, frivolous or vexatious or an abuse of the process of the court. We are unable to say that the claim is not bona fide or that the claim is bound to fail from the beginning. This is, therefore, not a proper case for the court to exercise its summary power under O 18 r 19 or under the inherent jurisdiction of the court under O 92 r 4 of the Rules of the High Court 1980. Accordingly, the lenders' application under those rules should not be allowed.

Let us now deal with the lenders' application for summary judgment under O 14 r 5 on the counterclaim against Carah in the JB action and under O 14 r 1 against the four guarantors. For convenience of reference, we reproduce O 14 r 1(1) and O 14 r 5(1) below:

> 1 Application by plaintiff for summary judgment (O 14 r 1)
>
> (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.
>
> 5 Application for summary judgment on counterclaim (O 14 r 5)
>
> (2) Where a defendant to an action begun by writ has served a counterclaim on the plaintiff, then, subject, to para (3), the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim, apply to the Court for judgment against the plaintiff on that claim or part.

The principle governing summary judgment under both rules are more or less the same. In a nutshell, in an application under O 14 made by the plaintiff for summary judgment without trial, the general principles established are that the plaintiff has to satisfy the court that the defendant plainly and obviously has no defence to the plaintiff's claim or part of the plaintiff's claim. If the plaintiff is able to satisfy the court, then summary judgment should be entered in the plaintiff's favour. On the other hand, if the defendant can show that there is a serious conflict of material facts as disclosed in the opposing affidavits, or there is otherwise a triable issue worthy of judicial investigation in the trial of the action, or there is an

important and difficult point of law requiring further and mature consideration at the trial, summary judgment should be refused. These general principles are also applicable to a counterclaim by a defendant against the plaintiff in the same civil action when an application is made under O 14 r 5. In *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183, Hashim Yeop Sani SCJ (as he then was) in delivering the judgment of the former Supreme Court said at p 183:

> (4) the underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

In the JB action, the lenders' application for summary judgment on their counterclaim was made under O 14 r 5. It is clear to us that the counterclaim is directly related to the same subject matter where we have held that Carah's claim is not scandalous, frivolous or vexatious and it did raise a reasonable cause of action. As we have also held that there is a triable issue in Carah's claim, we see no ground to grant summary judgment against Carah in the counterclaim.

Finally, let us now deal with the lenders' application for summary judgment under O 14 r 1 against the four guarantors in the KL action, which is also related to the same term loan of RM20m granted to Carah. We agree with the learned judge that for the lenders to succeed summarily without any trial of the two consolidated actions, the lenders must in the very first place succeed in striking out Carah's statement of claim in the JB action and in obtaining summary judgment in their counterclaim against Carah. However, as we have ruled against the lenders in their application in the JB action, their application for summary judgment in the KL action must also fail, as the outcome in the JB action will have a direct bearing on the KL action.

For the above reasons:

(a) this appeal is hereby allowed;

(b) the order of the learned judge dated 21 June 1996 is hereby set aside;

(c) the writ of summons and statement of claim in Johor Bahru High Court No 22–98–94 be restored to file, the summary judgment dated 21 June 1996 on the respondents' counterclaim against the appellants be set aside and unconditional leave to defend the counterclaim be granted to the appellants.

(d) the summary judgment dated 21 June 1996 against the appellants in the Kuala Lumpur High Court Civil Suit No Dl–22–501–94 be set aside and unconditional leave to be granted to the appellants;

(e) the respondents do pay to the appellants the costs here and below;

(f) the deposit of RM500 in this appeal be refunded to the appellants; and

(g) the two consolidated suits herein be fixed for mention before the honourable judge at Kuala Lumpur High Court (D1) on 24 November 1999 at 9am to fix the date of trial.

Appeal allowed.

Reported by Jafisah Jaafar